NOT DESIGNATED FOR PUBLICATION

ROBERT LETSCH AND MARY LETSCH	*	**NO. 2010-CA-1691**
	*	
VERSUS		**COURT OF APPEAL**
	*	
MEDICAL CENTER OF LOUISIANA, HUGH PRATT, M.D., CRAIG TERNOVITS, M.D. AND STATE OF LOUISIANA	*	**FOURTH CIRCUIT**
	*	
		STATE OF LOUISIANA
	* * * * * * *	

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2009-3383, DIVISION "K-5"
Honorable Herbert A. Cade, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Chief Judge Joan Bernard Armstrong, Judge Charles R. Jones, and Judge Dennis R. Bagneris, Sr.)

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JUNE 1, 2011

AFFIRMED

This is a medical malpractice case wherein the plaintiffs/appellants, Robert Letsch and Mary Letsch, appeal the district court's granting of an exception of prescription in favor of the defendants/appellees, State of Louisiana, Dr. Hugh Pratt and Dr. Craig Ternovits. The Letschs also appeal the denial of their motion to amend. For the reasons that follow, we affirm the judgments of the district court.

Facts

In 1990 Mr. Letsch underwent an operation for a gunshot wound. According to Mr. Letsch, on or about November 26, 2002, Dr. Hugh Pratt of the Medical Center of Louisiana at New Orleans performed an incisional hernia repair procedure. Mr. Letsch was under the impression that Dr. Pratt would be using "mesh" in the procedure because he claims that is what Dr. Pratt informed him of. Mr. Letsch alleges that his ping-pong ball sized hernia developed into a basketball sized hernia which required a second surgery on February 12, 2004. Dr. Craig Ternovits performed an open nissan fundoplication and ventral hernia repair. Mr. Letsch remained under the impression that Dr. Ternovits used mesh as well because he claims that just before he "went under" he reminded the doctor to use mesh to which the doctor responded that he did not think it was necessary.

However, it is Mr. Letsch's contention that once the surgery was over, Dr. Ternovits explained that it took longer than he anticipated because "they had to send for mesh". Once again, although the hernia was reduced in size after the second surgery, it grew to the size of a basketball. Mr. Letsch returned to the hospital two and a half months later. In an operative report prepared by Dr. Ternovits he wrote that he used a Gortex dual mesh in the procedure, however on July 25, 2007, Dr. Darren M. Rowan concluded that he did not identify a mesh prosthesis based on a CT scan performed on Mr. Letsch.

Procedural History

On May 17, 2005, Mr. Letsch requested a Medical Review Panel. On February 15, 2008, the Panel unanimously found no deviation from the standard of care. On March 4, 2008, all parties were notified via mail of the panel's decision. On May 19, 2008, Mr. and Mrs. Letsch filed suit against Dr. Pratt, Dr. Ternovits and the Medical Center of Louisiana in Civil District Court for the Parish of Orleans and no service was made. Suit was again filed on April 1, 2009 and service was perfected in June of that year. In July of the same year, the appellees filed an exception of prescription which the district court granted. Thereafter the Letschs filed a motion for new trial and a motion to allow amendment to their petition which were also denied. It is from these rulings that the Letschs appeal.

Assignments of Error

The Letschs assert that the district court erred (1) in granting defendants' exception of prescription and (2) in not allowing plaintiffs to amend their Petition under Louisiana Code of Civil Procedure Art. 934.

Standard of Review

> A defendant may raise a peremptory exception of prescription at any time. When such an exception is pled before trial, the exception is tried and disposed of in advance of or on the trial of the case. La. C.C.P. art. 929. In the trial of the peremptory exception pleaded at or before the trial of the case, "evidence may be introduced to support or controvert any of the objections pleaded, when the grounds thereof do not appear from the petition." La. C.C.P. art. 931. The trial court is not bound to accept as true the allegations of plaintiff's petition in its trial of the peremptory exception. When evidence is introduced and evaluated at the trial of a peremptory exception, an appellate court must review the entire record to determine whether the trial court manifestly erred with its factual conclusions. "Although the party pleading prescription ordinarily has the burden of proof, the burden is shifted to the plaintiff when the petition on its face reveals that prescription has run." *Jambon v. State Farm Fire and Cas. Co.*, 07–925, p. 4 (La.App. 5 Cir. 3/11/08), 982 So.2d 131, 133; *see also Carter v. Haygood*, 04–0646, p. 9 (La.1/19/05), 892 So.2d 1261, 1267. Furthermore, if the plaintiff's basis for claiming interruption of prescription is solidary liability between two or more parties, the plaintiff bears the burden of proving that solidary relationship. *Younger v. Marshall Industries, Inc.*, 618 So.2d 866, 869 (La.1993).

Ferrara v. Starmed Staffing, LP 50 So.3d 861, 865, 2010-0589 (La.App. 4 Cir. 10/6/10),), (La.App. 4 Cir.,2010)

LSA-R.S. 9:5628(A) *Actions for medical malpractice,* reads as follows:

> No action for damages for injury or death against any physician, chiropractor, nurse, licensed midwife practitioner, dentist, psychologist, optometrist, hospital or nursing home duly licensed under the laws of this state, or community blood center or tissue bank as defined in R.S. 40:1299.41(A), whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought unless filed within one year from the date of the alleged act, omission, or neglect, or within one year from the date of discovery of the alleged act, omission, or neglect; however, even as to claims filed within one year from the date of such discovery, in all events such claims shall be filed at the latest within a period of three years from the date of the alleged act, omission, or neglect.

The Letschs maintain that the three year prescriptive period under La. R.S. 9:5628 began to run February 12, 2004 and ran until May 16, 2005, the date the Medical Review Panel was requested; totaling a 15 month period. They then go on to argue that the three-year prescriptive period picked up again on June 2, 2008 (ninety days after the March 4, 2008 notice of conclusion of panel procedure) and ran until April 1, 2009; totaling 25 months.

Further, the Letschs argue that the one year prescriptive period based on the July 5, 2007 report of Dr. Rowan did not begin to run until June 2, 2008, 90 days after the March 4, 2008 notice of the panel proceedings and ran until April 1, 2009, the date suit was filed.

The Letschs also maintain that the date of discovery was not until July 5, 2007 when Dr. Rowen reported that no mesh was used; thus giving them a year from that date.

We will review the record before us to establish whether the Letschs filed suit within the prescriptive period outlined in LSA-R.S. 9:5628(A). The following timeline is this Court's account of events from the record before us:

> November 26, 2002 - Mr. Letsch undergoes an incisional hernia repair procedure performed by Dr. Hugh Pratt at the Medical Center of Louisiana.
>
> February 12, 2004 – Mr. Letsch undergoes a nissen fundoplication and venteral hernia repair performed by Dr. Ternovits at the Medical Center of Louisiana.
>
> February 19, 2008 – Medical Review Panel renders judgment.
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> March 3, 2008 – Medical review Panel informs parties via U.S. mail of judgment.
>
> April 1, 2008 - the Letschs file a *Petition for Damages* in Civil District Court for the Parish of Orleans against

Medical Center of Louisiana, Hugh Pratt, M.D., Craig Ternovits, M.D. and the State of Louisiana.

May 15, 2009 – A *Declinatory Exception of Insufficiency of Service of Process* is filed by the State of Louisiana, Medical Center of Louisiana, Hugh Pratt, M.D. and Craig Ternovits, M.D.

July 10, 2009 - An *Exception of Prescription* is filed by the State of Louisiana, Medical Center of Louisiana, Hugh Pratt, M.D. and Craig Ternovits, M.D.

October 8, 2009 – the Letschs file a *Motion for An Order to Allow Plaintiff Time to Amend Petition Under La. C.C. P. Art. 934* that was denied by the district court on October 9, 2009.

October 30, 2009 – the Letschs file a *Motion for New Trial* that is later opposed by the defendants

December 18, 2009 – the district court denies the plaintiff's Motion for New Trial after hearing oral arguments.

January 15, 2010 – the Letschs start the appellate process

Assignment of Error#1

In their first assignment of error, the Letschs assert that the district court erred in granting defendants' exception of prescription.

"Prescription commences when a plaintiff obtains actual or constructive knowledge of facts indicating to a reasonable person that he or she is the victim of a tort." *Campo v. Correa*, 01–2707, pp. 11–12 (La.6/21/02), 828 So.2d 502, 510. "Even if a plaintiff does not have actual knowledge entitling him to bring a suit, constructive knowledge that excites attention and puts the "injured party on guard and call for inquiry" is sufficient." *Id.* at p. 12, 828 So.2d at 510–11. "Such information or knowledge as ought to reasonably put the alleged victim on inquiry is sufficient to start running of prescription." *Id.* at p. 12, 828 So.2d at 511.

"Mere apprehension 'that something is wrong is not sufficient to start prescription unless plaintiff knew or should have known by exercising reasonable diligence that his problem condition may have been caused by acts of malpractice'." *Gunter v. Plauche,* 439 So.2d 437, 439 (La.1983). "[P]rescription does not run as long as it was reasonable for the victim not to recognize that the condition may be related to the treatment." *Griffin v. Kinberger,* 507 So.2d 821, 823–24 (La.1987). However, "knowledge that an undesirable condition has developed ... after medical treatment does not equate to knowledge of everything to which inquiry might lead." *Campo,* 01–2707, p. 15, 828 So.2d at 512–13; *In re Medical Review Panel Proceedings of Berry,* 2006-0752, (La. App. 4 Cir. 1/27/10) 30 So.3d 251, 256.

Mr. Letsch relies on *Campo* to support his contention that the bulging hernia in July 2004 was not enough to alarm him into believing that perhaps malpractice had occurred and that it was not until July 5, 2007, when Dr. Rowen reported that mesh was not used, that Mr. Letsch was put on actual notice which he believes begin the one-year prescriptive period under LSA-R.S. 9:5628(A). However, we find that the date of discovery remains questionable. According to the appellants, Mr. Letsch argued in the district court that prescription had *not* begun to run because no doctor had informed him that malpractice had occurred, however, the appellants argue that on appeal for the first time, Mr. Letsch attaches the July 5, 2007 date to the start of prescription.

LSA-R.S. 40:1299.39.1(2)(a) reads, in pertinent part, as follows:

> The filing of the request for a review of a claim **shall suspend the time within which suit must be instituted**…**until ninety days following notification, by certified mail**…to the claimant or his attorney of the

> issuance of the opinion by the state medical review panel…

The medical review panel issued their decision on March 4, 2008. The Letschs were required to file suit within 90 days of that decision. The Letschs filed suit on April 9, 2009, clearly the 90 day prescriptive period had run. The Letschs had the burden at trial to rebut that prescription had not run and they failed to prove otherwise. As far as applying the three-year prescriptive period, the Letschs suggest that the 90 days (after the medical review panel decision is mailed) are added to any remaining period of the three year prescriptive period. There is no merit to such an argument, nor do the Letschs offer any supportive law to this theory.

The district court did not err in concluding that the Letsch's claim had prescribed on its face.

Assignments or Error #2

In their second assignment of error, the Letschs maintain that the district court erred in not allowing them to amend their petition under Louisiana Code of Civil Procedure Art. 934, *Effect of sustaining peremptory exception*, which specifically reads:

> When the grounds of the objection pleaded by the peremptory exception may be removed by amendment of the petition, the judgment sustaining the exception shall order such amendment within the delay allowed by the court. If the grounds of the objection raised through the exception cannot be so removed, or if the plaintiff fails to comply with the order to amend, the action, claim, demand, issue, or theory shall be dismissed.

In a very brief argument, the Letschs assert that the trial court "should have either 1) allowed plaintiffs to amend their petition to allege facts with particularity to

show that the first time he [Mr. Letsch]received information which indicated that his post operative bulging hernia condition might have been the result of improper medical treatment during his February 12, 2004 surgery was Dr. Rowen's July 5, 2007 report, or 2) denied defendant's Exception of Prescription based on their failure to carry their burden of proving the facts to support their objection of prescription". Specifically, the Letschs argued to the district court in their *Supplemental Memorandum in support of Motion for an Order to Allow Plaintiff Time to Amend Petition Under La.C.C.P. Art 934* that "the petition contains no allegation and an amended petition, if allowed, will contain no allegation that his treating physician (Dr. Darren M. Rowen) informed him either that there was, in fact, no mesh, or that medical malpractice occurred. Moreover, in the case at bar, although most of the facts surrounding Robert Letsch's surgeries are delineated in this Petition and will be further delineated in his amended petition, the record is and will continue to be void of proof of the date on which prescription begun to run".

Adopting the reasoning of our cohorts in the Second Circuit, we agree with *Nestor v. Louisiana State University Health Sciences Center In Shreveport* 917 So.2d 1273, (La.App. 2 Cir. 12/30/05), 40,37, wherein the Court found:

> Medical malpractice claims are subject to a one-year prescriptive period, that is, one year from the date of the act or from the date of discovery. However, regardless of the date of discovery, all claims must be filed within three years of the alleged act. La. R.S. 9:5628. Although the date of discovery may not generally be extended beyond the three year limit by interruption or suspension, an exception to prescription or peremption may be made for claims brought forth by an amending petition. *See Randazzo v. State, Louisiana State University Health Sciences Center,* 2003-1470 (La.App. 1st Cir.05/14/04), 879 So.2d 741, *writ denied,* 2004-1503 (La.02/18/05), 894 So.2d 337. "When the action ... arises out of the

> conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of filing of the original pleading." La. C.C.P. art. 1153. *See Richard v. Colomb,* 2004-1145 (La.App. 1st Cir.06/29/05), 916 So.2d 1122. A physician has a duty to inform the patient of (1) the nature and purpose of the procedure, and (2) the known material risks that may arise from the noticed procedure. La. R.S. 40:1299.40

However, it well within the discretion of the district court to allow a plaintiff to amend their petition. We will not disturb such a ruling on appeal when clearly there is no abuse of this discretion nor is there manifest error. The law has made it clear the one cannot amend their petition if it results in a change the substance of the original claims. See *Massiha v. Beahm, LAMMICO, and ABC,* 2007–0137 (La.App. 4 Cir. 8/15/07), 966 So.2d 87. La.; *Fortier v. Hughes*, 2009-0180 (La. App. 4 Cir 6/17/09) 15 So.3d 1185, 1188.

In the instant matter, the district court found that an amendment of the petition would fail to assert anything different than what the original petition alleged and we agree after review of the Letsch's reasoning requesting to amend.

We find no error in this ruling.

Decree

For the reasons set forth above, we affirm the judgment of the district court granting the exception of prescription on behalf of the State of Louisiana, Dr. Hugh Pratt and Dr. Craig Ternovits. We also affirm the district court's denial of the Robert and Mary Letsch's motion to amend.

AFFIRMED